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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1053

ANTHONY PROVENZANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above named petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled cause on December 22, 1965, which affirmed an order of the United States District Court for the District of New Jersey, filed on March 30, 1965, denying petitioner's motion for an order setting aside the judgment of conviction herein and granting him a new trial.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A, *infra*, p. 1a. The opinion of the District Court is reported at 240 F. Supp. 393, and is part of the record as printed for the use of the Court of Appeals (624a-667a).*

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1965 (App. B, *infra*, p. 2a). A timely petition for rehearing filed by petitioner was denied by that Court on January 25, 1966 (App. C, *infra*, p. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether on a motion for a new trial made by a defendant in a criminal case on the basis of a juror's undisclosed prejudice and misrepresentation and concealment of material facts on his *voir dire* examination, it is error for the District Court to deny the motion, after a hearing, on the ground that the defendant had not sustained his burden of proof, notwithstanding:

(a) Undisputed evidence that the juror had prior to the trial engaged in discussions—which he did not disclose on the *voir dire* examination—expressing his resentment because of the "crossing" of the strike picket lines of the local United Automobile Workers union of which the juror

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* Figures in parentheses followed by the letter "a", unless otherwise specified, refer to the pages of petitioner's printed Appendix in the Court of Appeals. Nine copies of the printed Appendices in the Court of Appeals are being filed with this petition.

was an officer, by a Teamsters local union of which the defendant was the president; and

(b) The conceded fact that the juror had on the *voir dire* examination falsely denied having seen or read prejudicial publicity concerning the defendant.

2. Whether, in reaching its decision on the basis of a hearing on such a motion, it is error for the District Court to refuse to take into consideration the Government's unaccounted-for failure to produce any testimony, or even a deposition or affidavit, from the juror himself in refutation of the testimony of the defendant's witnesses concerning prejudicial pre-trial statements made by the juror against the defendant.

3. Whether it is error for the District Court on such a motion to draw an adverse inference against the defendant and to hold that there was insufficient corroboration of the testimony of the defendant's witnesses, because of his failure to call additional potential witnesses, notwithstanding the absence of any showing that the testimony of such additional witnesses would be anything more than cumulative.

4. Whether it is error for the District Court to hold on such a motion, in a situation involving a defendant who was a high ranking official of the International Brotherhood of Teamsters, that the defendant was not entitled to a new trial on the basis of a showing merely that the juror had prior to the trial expressed strong prejudice against the Teamsters in general, so long as it were not established to the Court's satisfaction that the juror had inveighed against the defendant personally.

5. Whether it is appropriate, and within this Court's jurisdiction, to make an independent evaluation of the evi-

dence bearing on petitioner's claim that he was deprived of his right to a trial by an impartial jury, in violation of the Fifth and Sixth Amendments, and whether the evidence in this record sustains that claim.

Constitutional Provisions and Rules Involved

The constitutional provisions and rules involved are the Fifth and Sixth Amendments to the United States Constitution and Rules 24 and 33 of the Federal Rules of Criminal Procedure. The pertinent provisions thereof are as follows:

United States Constitution:

Amendment V

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

Federal Rules of Criminal Procedure:

"Rule 24. Trial Jurors

"**(a) Examination.** The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or

his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

"**(b) Peremptory Challenges.** If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. * * *"

"Rule 33. New Trial

"The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *"

Statement

Petitioner was convicted in the United States District Court for the District of New Jersey, by a jury verdict rendered June 13, 1963, of the crime of interference with commerce by extortion (18 U.S.C. §1951), and sentenced on July 12, 1963 to a prison term of seven years and fined the sum of $10,000. The conviction was affirmed by the Court of Appeals for the Third Circuit on June 30, 1964, and *certiorari* was denied by this Court on December 14, 1964. *United States* v. *Provenzano,* 334 F. 2d 678, cert. den. 379 U. S. 947.

On January 4, 1965, petitioner filed a motion for a new trial, with supporting affidavits, in the District Court on the basis of the undisclosed bias of one of the jurors, Stephen J. Cassidy, Sr., and the latter's misrepresentation and concealment of material and pertinent facts on his *voir dire* examination (3a-89a). The motion was predicated on Rule 33 of the Federal Rules of Criminal Procedure (4a), as well as on the constitutional guarantees of trial by an impartial jury, under the Sixth Amendment, and of due process of law under the Fifth Amendment (55a). The Court directed a hearing limited "to the issue of alleged prejudice on the part of a juror", and further restricted the calling of witnesses by petitioner (but not by the Government) to "those persons whose affidavits were filed" (98a-100a). After completion of the testimony, and after concluding arguments by counsel, the Court rendered an opinion (624a-667a) and order (668a) denying the motion.

The *Voir Dire* Examination

The juror here involved, Stephen J. Cassidy, Sr., was Juror No. 5 among the first 12 jurors placed in the jury box (15a, 659a). He stated that he was employed by the Ford Motor Company in Mahwah, New Jersey, and was a trustee on the Executive Board of Local 906 of the United Auto Workers ("U.A.W.") (17a, 18a), with which he had been associated since 1941, and had held a succession of other offices in that local (20a, 21a).

The Court asked the following questions, among others of the prospective jurors:

> "Do you know of any circumstances of any nature whatsoever which might affect a fair, impartial judgment because of the fact that the defendant is an officer of that particular union [Local 560, In-

ternational Brotherhood of Teamsters] and is the defendant in this case?" (16a)

"Ladies and gentlemen of the jury, do you know —does any one of you know of any matters which you should call to our attention which might have some bearing on your qualifications to serve as a juror in this case? If so, now is the time to speak up." (18a)

"Has any union with which those of you who have membership in unions are concerned, has any union in which you have membership ever been— assisted in any concerted labor activity of the Teamsters or been assisted by the Teamsters?" (19a)

Cassidy gave no response to any of the foregoing questions, thereby indicating negative answers.

One of defendant's attorneys, Martin Moroney, then asked the following question of the prospective jurors as a group:

"Now ladies and gentlemen in the box, have any of you heard anything derogatory about Mr. Provenzano either from a source of words of mouth or any other means of communication?" (22a)

Cassidy made no response to this question. Following a response by another prospective juror, Juror No. 8, Mr. Moroney stated (23a):

"Well, then, there is no one else but Miss Smith who has read something in the newspapers about Mr. Provenzano, is that so?"

Cassidy thereupon stated (23a):

> "We read this morning's paper. There was a little bit of write-up in the Star-Ledger. That is the first I knew of it. * * * Just stating that the jury would be picked."

The Court thereupon asked whether what he there read would create any bias or prejudice (23a), and Cassidy's answer was that it "couldn't" and "only stated that a jury would be picked" (24a). The Court then stated (24a):

> "Now, ladies and gentlemen of the jury in the box, I would like each of you who have heard about Anthony Provenzano in any way by radio, television or newspaper, to raise your hands."

Five prospective jurors, other than Cassidy—*i.e.*, Jurors Nos. 3, 4, 6, 7 and 8—thereupon raised their hands, and they were interrogated by the Court (24a).

Defendant's attorney, Moroney, also asked the following question, to which no response was made by Cassidy (22a):

> "Would the fact that the Teamsters Union is an independent union not connected with the A.F.L.-C.I.O. cause you to be biased in any way or prejudiced?"

The Testimony of Petitioner's Witnesses

Petitioner was for several years prior to his trial herein, and still is, president of Local 560 of the International Brotherhood of Teamsters in New Jersey (75a). He is also an international vice-president of the Teamsters, and president of Teamsters New Jersey Joint Council 73 (78a, 109a).

He never met Cassidy and never had any dealings with him, and never heard of Cassidy's name prior to the trial (77a). Petitioner and his trial counsel submitted affidavits —as to which no issue was raised herein—that they had no knowledge or information of any kind to indicate possible prejudice on Cassidy's part or that he gave false answers or withheld any information on the *voir dire* (45a, 59a, 77a).

Petitioner adduced testimony from eight separate witnesses showing that the juror Cassidy had over a period of years prior to petitioner's trial expressed strong, deep-seated feelings of hatred, hostility and prejudice directed against petitioner personally, as well as against the Teamsters generally and their international president, James Hoffa. Cassidy was employed as a cycle checker at the Ford plant in Mahwah, New Jersey, and was also an officer of U.A.W. Local 906, which represented the Ford employees at the plant (105a, 165a-167a).

Cassidy's alleged prejudicial statements fell into several categories:

A. Statements by Cassidy in arguments with petitioner's witness Charles Giannone.

These arguments occurred in the so-called LCL area of the Ford plant, consisting of a dock at which trailers were unloaded and an adjoining office (103a-105a, 107a-108a). Giannone was a member of petitioner's Teamster Local 560 and had desk space in the LCL office in connection with work as a switcher which he or his company performed at the dock by arrangement with the Ford Company (103a-104a). It was undisputed that in the course of his duties as a cycle checker Cassidy called on an average of two or three times a week at the LCL office (105a, 401a, 422a,

427a). Giannone testified that he had a running series of arguments with Cassidy from 1959 up to the spring of 1963 about the Teamsters, Hoffa and petitioner, and that these arguments occurred on the LCL dock, or in the pit below the dock, or in the outer area of the LCL office (105a-106a, 107a-108a, 138a-139a).

Among other things, Giannone and Cassidy argued about the labor contracts of the Teamsters as compared to those of the U.A.W., and Giannone boasted about the higher wages, the extra holidays and other superior benefits under the Teamster contracts (106a). Cassidy's answer was that the only reason for this was that petitioner used "strong-arm methods" against employers and was "nothing but a racketeer and gangster" (106a). Cassidy on many occasions repeated his characterization of petitioner as "a racketeer and a gangster, a bum, a bad labor leader", and also accused petitioner of using strong-arm methods against his opponents in union elections (106a, 108a-109a).

According to Giannone, Cassidy supported his accusations against petitioner by reference to various newspaper articles which he showed Giannone, including (a) an article reporting another indictment returned against petitioner in November 1962, charging him with a violation of the Taft-Hartley Law in having received the rent-free use of a house from the president of a large trucking concern, Eastern Freight Ways, with which petitioner's union had dealings (113a-115a; Exh. D-3, 609a); (b) an article about the shooting of one of petitioner's union opponents (108a-109a; Exh. D-1, 607a); (c) an article about the disappearance of Anthony Castellito, petitioner's former fellow union business agent, whose name was prominently mentioned in the testimony at petitioner's trial, and in relation to whom the jury interrupted their deliberations at

the trial to ask the Court why he had not been called as a witness (111a-112a; 560a-563a); (d) an article reporting a $50,000 pay increase voted to petitioner by his union early in 1963 (115a-116a); and (e) highly prejudicial literature widely circulated in the Ford plant by the slate opposing petitioner in his contest for re-election as president of Teamster Local 560 in December 1962 (119a-121a; Exh. D-12, 617a; Exh. D-7, 613a; Exh. D-11, 615a).

Cassidy concluded many of his arguments with Giannone by saying that sooner or later, with all the charges the authorities had against petitioner, they would send him to jail (118a). Cassidy also told Giannone that the Teamsters had been properly expelled from the AFL-CIO "because they were gangsters and racketeers, bums", and should not be re-admitted, and that Giannone "had no union" (116a-117a).

Giannone was corroborated by Terry Miner, a trustee and former vice-president and committeeman of U.A.W. Local 906, who testified that he heard a number of arguments between Cassidy and Giannone in the LCL area, mostly on the dock, at various times prior to petitioner's trial, in which Cassidy called petitioner a "racketeer" and "gangster" and accused him of "fixing elections" (194a, 195a, 198a, 203a, 204a, 216a). Additional corroboration was provided by four other witnesses—Orrie Helms, Patrick Mahoney, Ernest Prezioso and Frank Durando—who worked for the Ford Company in the LCL area and were members of U.A.W. Local 906, and who testified to various arguments that they overheard between Cassidy and Giannone on the LCL dock in which Cassidy made highly prejudicial remarks about petitioner and the Teamsters (326a-328a, 330a, 339a-340a; 342a-343a; 309a-311a, 312a, 315a-317a, 324a; 286a-288a, 295a).

B. Statements by Cassidy to persons other than Giannone.

Petitioner also adduced testimony from two other former U.A.W. officials—Thomas F. Bladen, previously president of U.A.W. Local 906 (147a, 148a), and Albert J. Donnelly, formerly a committeeman of that local (542a)—as well as from Miner, as to derogatory statements made by Cassidy about petitioner or the Teamsters on other occasions and at other places than those testified to by Giannone.

Bladen testified to statements made by Cassidy at U.A.W. Local 906 headquarters before or after executive board meetings, or in the union committee room at the Ford plant, or elsewhere in the plant, which occurred over a running period from 1958 until early in 1963 (149a, 153a, 162a, 169a, 170a, 179a, 180a, 183a). According to Bladen, Cassidy referred to petitioner in such statements as "not a labor leader", and nothing but a gangster and an associate of the underworld and a member of the "Mafia" (154a, 172a). Cassidy also referred to the Teamsters in general in similar terms as a corrupt, graft-ridden organization and as "crooks, racketeers and gangsters that weren't fit to be union leaders" (148a-149a, 169a-170a), and said that they were properly expelled from the AFL-CIO and should not be readmitted (161a-162a). When discussing the Teamsters' contracts as compared to those of the U.A.W., Cassidy stated that the Teamsters used strong-arm methods which the U.A.W. would not tolerate (149a-150a).

Cassidy generated most of the discussions concerning petitioner and the Teamsters on the basis of various newspaper articles relating to them (149a, 158a), and displayed articles about petitioner's indictment in the Eastern Freight Ways case (158a-159a; Exh. D-5, 611a), and the article relating to petitioner's $50,000 pay increase in early

1963 (159a-161a; Exh. D-13, 619a). Cassidy also made derogatory statements about petitioner in connection with the 1962 Teamsters Local 560 election, which aroused great interest in the plant (153a-154a, 172a); and after petitioner's narrow victory in that election, Cassidy accused him of resorting to intimidation and "fixing" of the ballot boxes (155a).

Bladen also testified about certain incidents which occurred when the U.A.W. had a strike against the Ford Company in November 1961 (150a). While Cassidy was not in office at the time, he was still very active in union affairs and was a union committeeman (179a, 184a). In advance of the strike, Cassidy suggested that Bladen, as president of the U.A.W. local, send a telegram to petitioner, requesting the cooperation in the strike of petitioner's Teamsters Local 560, which represented the Teamsters employed in picking up the new cars that rolled off the assembly line at the Ford plant (150a-151a). Bladen sent such a telegram, but received no answer (151a). On the first day of the strike, the Teamsters cooperated by not picking up any of the new cars (151a), but on the next day a delegate from Local 560 visited the plant and told the U.A.W. representatives, including Bladen and Cassidy, that the Teamsters would have to take the cars out, or otherwise be guilty of a secondary boycott (152a, 164a). The reaction of the U.A.W. representatives, including Bladen and Cassidy, was one of "bitterness" and "great anger and frustration", and Cassidy said, "'Well, what would you expect from the Teamsters and Tony Provenzano?'" (152a, 154a-155a). Cassidy also said that it would be "pretty difficult" for him to "explain" the Teamsters' refusal of cooperation to the U.A.W. rank and file members, but Bladen told him to go ahead and explain it to them even though it was "distasteful" (152a-153a).

Miner testified that in addition to hearing Cassidy-Giannone arguments, he also heard Cassidy engage in discussions with others at U.A.W. union headquarters and in other parts of the plant besides the LCL area, in which Cassidy called petitioner a "racketeer" and "gangster" and accused him of "fixing" elections (196a, 197a, 200a, 210a, 211a, 212a), and that on one occasion, at a board meeting at union headquarters he saw Cassidy display and discuss the newspaper article about petitioner's $50,000 salary increase (200a-201a, 215a, 216a).

Donnelly testified that he heard Cassidy refer to petitioner personally on two occasions at discussions with others in U.A.W. Local 906 union headquarters—once, just before the 1962 Teamster Local 560 election, when Cassidy stated that "this is a good opportunity for them to get rid of Tony Pro and the type in the Teamsters like him, to clean them up" (538a), because they were "nothing but gangsters and racketeers" (552a); and on a second occasion, after the election, when Cassidy stated "that this was another typical teamster election, that Tony Pro and his people stopped some of the opposition from voting" (539a). On between 18 to 24 other occasions prior to petitioner's trial, mainly at union headquarters and sometimes at the plant, Donnelly also heard Cassidy condemn "Hoffa and the Teamsters as a whole" and say that they were "no good, racketeers, thieves, hoods" (539a, 550a). Donnelly testified candidly and forthrightly that on the latter occasions, as distinguished from the two occasions when the Teamster election was discussed, petitioner's name was not mentioned by Cassidy, so far as he could recall (542a-544a, 550a).

A ninth witness called by petitioner, John Dougherty, Jr., had previously signed an affidavit for petitioner, in which he too stated that he had heard Cassidy make derog-

atory remarks about petitioner, in arguments with Giannone, prior to petitioner's trial (53a-54a). He later repudiated that affidavit in an affidavit for the Government (90a-93a). But in his testimony he unequivocally admitted that he had voluntarily told petitioner's counsel and investigator the facts embodied in his original affidavit (222a, 227a, 228a, 239a, 245a, 266a); that he had made a special trip into New York City from his home in New Jersey to tell his story to petitioner's attorney (222a-224a); that he had voluntarily signed the affidavit for petitioner at his home only after reading it twice and only after requesting that one particular line be stricken therefrom (235a-239a, 267a-268a); and that he believed that affidavit to be true when he signed it (271a-272a).

Dougherty had a desk in the L.C.L. office near Giannone's desk (259a). He and his father, who also worked at the Ford plant, had run on the same union slate with Cassidy (225a, 247a). Dougherty's sole explanation for his change of position was that on further reflection he realized he had "made a mistake" and "a hasty decision" (240a, 269a), and that he had merely "thought" that he had heard Cassidy engage in arguments with Giannone and make derogatory statements about petitioner (239a, 240a), even though he admitted that he had told, not only petitioner's attorney and investigator, but also his own father, that he had actually heard Cassidy engage in such arguments and make such derogatory statements (239a, 240a, 245a-246a, 249a, 255a-256a). He also admitted that he had given petitioner's attorney the names of other potential witnesses (256a-257a). He further testified that he was under medical treatment for a nervous condition (265a-266a), and that he had signed the affidavit for the Government only after he had been embarrassed by newspaper publicity concerning his prior affidavit (246a-247a)

and had been instructed by his plant's head of security to "cooperate with" two F.B.I. agents who interviewed him (249a-252a).

The Government's Witnesses

The Government made no effort to call the juror Cassidy as a witness, and did not even obtain any affidavit from him. The Government called six witnesses. Four of them —George Squires, Clifford A. Scantland, Jr., Joseph Snaguski and Stanley Bloom—worked in the LCL office. The other two were Lawrence E. McConnell, who had been president of U.A.W. Local 906 from 1958 to 1960, and Patrick DeMarco, a vice-president of that local.

The testimony of the Government witnesses confirmed that the atmosphere at the Ford plant was one in which there was constant disputation about petitioner and the Teamsters. Snaguski and Scantland thus corroborated the fact that there was substantial campaigning by the rival factions on the Ford premises in Mahwah when petitioner ran for re-election as president of his Teamster local in the fall of 1962, and that slogans of the anti-petitioner faction were displayed on trailers coming into the LCL dock (430a, 436a-437a, 447a-448a). McConnell likewise admitted that literature of the opposing factions was posted on the Ford premises (389a-390a). Snaguski also admitted that he heard arguments in the LCL office between Giannone and various U.A.W. officials, among others, concerning the Teamsters and petitioner, in which Giannone spoke up for petitioner and boasted about the superior benefits under the Teamster contracts; and Snaguski stated that "Everybody is always kidding one another about one local being better than the other one" (434a-436a). McConnell also admitted that he had discussions with Giannone in the LCL office about the Teamsters and the U.A.W. (385a-388a).

While the testimony of the four Government witnesses who worked in the LCL office was offered to show that they had not heard any arguments between Cassidy and Giannone as claimed by petitioner's witnesses, their testimony did not establish that such arguments did not take place, either in the office or on the dock. Thus, Squires, when asked whether he had ever heard any such arguments, answered that he didn't remember and "couldn't say"; that he was so busy with two phones going steadily all day, that even though there were "arguments going on" about him, he didn't "have the time to turn around and see who was arguing or what" (422a, 424a). Similarly, Scantland, while stating that he never saw Cassidy and Giannone engage in any arguments (446a), admitted that he saw them talking together on a number of occasions but "never paid any attention", and that he was "pretty busy to bother with what is going on in there" (445a, 448a, 449a).

Snaguski, while denying that he ever heard Cassidy and Giannone engage "in any *arguments*" about petitioner or the Teamsters (426a), admitted that he told petitioner's investigator Scanzo (as Scanzo testified in rebuttal, 472a), that he did at times "hear bits of *discussions*" between them "about which union was better, such as better benefits and stuff like that" (437a-438a). Bloom, though also stating that he never heard or saw Cassidy and Giannone engage in any arguments prior to petitioner's trial (402a), further testified that there were "arguments all day long" in the LCL office "especially around Giannone", who was "quite an argument center" (408a), and that he, Bloom, would "try not to listen to all these arguments" (412a) and "didn't want to get involved in anything" (411a). Indeed, when asked by the F.B.I. whether he had heard any of the alleged arguments between Giannone and Cas-

sidy, Bloom did not say that there were no such arguments; his answer, instead, was: "I try not to listen to all these arguments, but I had heard one argument" (412a)—the latter reference being to an argument between Giannone and Cassidy after the trial (402a).

The other two Government witnesses, McConnell and DeMarco, while denying that they ever heard Cassidy make disparaging remarks about petitioner, actually corroborated the testimony of petitioner's witness Bladen, concerning the 1961 U.A.W. strike incident (*supra*, p. 13). McConnell thus gave a statement to agents of the F.B.I. on February 9, 1965, which he admitted he gave "in relation to Mr. Cassidy" (518a), and in which he stated "that during the 1961 UAW strike at the Ford Plant there was considerable discussion concerning the fact that the members of the International Brotherhood of Teamsters (IBT) were 'crossing' the UAW picket lines at the Ford Plant but that this discussion was limited to the relative abilities of Walter Reuther as a union leader as opposed to the abilities of James Hoffa" (517a-518a; Exh. G-1, 622a).

DeMarco also admitted that he gave a statement to agents of the F.B.I. on February 9, 1965 in which he stated that "during the UAW strike at the Ford Plant in Mahwah in 1961, Cassidy and Thomas F. Bladen were in disagreement over the fact that members of IBT were 'crossing' the UAW picket lines at the Ford Plant and that Cassidy did not think this was proper procedure for the IBT" (512a; Exh. G-9, 623a).

McConnell, indeed, in his testimony denied only that he ever heard Cassidy make any remarks *about petitioner* or seen him show any newspaper clippings *about petitioner* in his presence (381a, 385a). He did *not* testify that he

never heard Cassidy make derogatory remarks *about the Teamsters* or other Teamster officials, and he did not controvert the testimony of petitioner's witness Donnelly that he, McConnell, was present on a number of occasions when Cassidy made derogatory remarks about the Teamsters without mentioning petitioner's name (549a).

In an affidavit for the Government DeMarco stated that "Cassidy spoke disparagingly of other unions including the teamsters, as compared to the United Auto Workers * * *" (97a). Though he sought to qualify this statement in his testimony by stating that the only disparaging remark he ever heard Cassidy make about the Teamsters was during the Kennedy-Nixon contest in 1960 when Cassidy called the Teamsters "God-damn b — — —" for not endorsing Kennedy (355a, 356a), he admitted that Cassidy might have discussed the Teamster contracts in relation to the U.A.W. contracts (357a). It is further significant that in his statement to the F.B.I., DeMarco denied having heard Cassidy make any derogatory remarks about petitioner only as respects the period from 1957 to 1960 and the period since 1962, making no such denial as to the period between 1960 and 1962 when the strike incident occurred; and that he further denied having heard Cassidy make any derogatory statements about the Teamsters only as respects the period from 1957 to 1960 (623a).

The Decisions of the Courts Below

In its opinion, which was adopted by the Court of Appeals (App. A, *infra*, p. 1a) the District Court made no mention whatever of the 1961 U.A.W. strike incident, or of McConnell's F.B.I. statement concerning that incident, and made only passing reference to DeMarco's F.B.I. statement without any discussion of its contents (645a).

The Court acknowledged that the record at least showed "that it would be likely that certain adverse publicity directed toward the defendant would come to the attention of Mr. Cassidy as a member and officer of Local 906 UAW together with other knowledge of the activities of the Teamsters" (661a). Nevertheless, even though the transcript of the *voir dire* undisputedly showed that Cassidy had flatly denied having read any advance publicity concerning petitioner (*supra,* pp. 7, 8), the Court held that it was immaterial that defense counsel might have exercised a peremptory challenge against Cassidy if such information had been disclosed on the *voir dire,* and regarded it as decisive that they did not exercise such a challenge when informed that Cassidy was an officer and member of U.A.W. Local 906 (661a).

Indeed, in the course of counsel's concluding arguments and without any basis in the record, and in complete disregard of the affidavits of petitioner and his trial counsel as to their lack of knowledge or information indicative of any possible prejudice on Cassidy's part (45a, 59a, 77a), the Court suggested that petitioner's trial counsel could not have been "so naive" as to take Cassidy at his word that he had never "heard" "anything derogatory" about petitioner (602a-603a), and went so far as to state that it was "satisfied that defense counsel wanted him [Cassidy] on the jury" (604a).

Without making any finding that petitioner's witnesses were lying, the Court held that petitioner had failed to sustain his burden of proof of establishing such "preconceived prejudice" on Cassidy's part as "would impel him to vote for a conviction on any basis other than fair and impartial consideration of the evidence adduced at trial" (657a). The Court placed major reliance, in support of its decision, on the fact that petitioner had not produced

further corroborating testimony from other potential witnesses, particularly those mentioned in the testimony as having been present when Cassidy made the derogatory remarks in question, and it held that "It may be inferred that they [the additional potential witnesses] would not, if called to testify, have furnished the desired corroboration" (639a-640a, 655a-656a). The Court further drew the inference, as having an important bearing on "corroboration of Mr. Bladen's testimony", that if Cassidy had actually made the many derogatory statements attributed to him by Bladen, "substantial, timely and effective corroboration would not have been difficult to obtain" (655a-656a).

The District Court flatly refused to take into consideration the Government's failure to call the juror Cassidy as a witness, invoking a purported judicial policy against post-trial interrogation of a juror (576a-577a, 590a-591a; see also 664a-667a, where the Court laid great stress on a New Jersey decision, *State* v. *LaFera*, 42 N. J. 97, 199 A. 2d 630, applying a rule of the New Jersey Supreme Court which prohibits attorneys, without leave of court, from interviewing any juror, through an investigator or otherwise, "with respect to the verdict or deliberations of a jury").

The District Court further materially misstated the testimony of petitioner's witness Donnelly (*supra*, p. 14), and erroneously stated, on the basis of incomplete excerpts from the testimony, that Donnelly's testimony was that Cassidy had never spoken derogatorily about petitioner, but had done so only about the Teamsters and Hoffa (651a-654a; see especially 654a, first four lines, where the Court excerpts certain of Donnelly's testimony, but omits the immediately following clarifying testimony set out at 543a).

On the basis of its erroneous version of Donnelly's testimony, the Court interpreted that testimony as tending "to support an inference that Mr. Cassidy entertained no prejudice toward Provenzano" (651a-652a), thereby reflecting its erroneous view that it was not sufficient merely to show that Cassidy had expressed strong prejudice against the Teamsters in general, so long as it were not established to the Court's satisfaction that Cassidy had inveighed against petitioner personally.

Reasons for Granting the Writ

1. As to the remedy available to a defendant where a juror has misrepresented and failed to disclose facts having a material bearing on his qualifications.

A highly important question of general applicability affecting the administration of criminal justice in the Federal courts is here presented which involves a conflict among the circuits and has not been previously determined by this Court. That question relates to the criteria to be applied in determining whether a juror's misrepresentation and non-disclosure, on his *voir dire* examination, of facts having a material bearing on his qualifications to serve and pertinent to the exercise of defense counsel's right of peremptory challenge, are sufficiently prejudicial to warrant the granting of a motion for a new trial after conviction.

The Tenth Circuit applies the standard even in civil cases that it is sufficient to warrant a new trial to show merely that a juror, *albeit inadvertently,* withheld information on the *voir dire* which "was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his right

of peremptory challenge." *Photostat Corporation* v. *Ball*, 338 F. 2d 783, 787 (10th Cir.); *Consolidated Gas and Equipment Company of America* v. *Carver*, 257 F. 2d 111, 115 (10th Cir.). The underlying rationale is that counsel's right of peremptory challenge "must be exercised with full freedom, or it fails of its full purpose" (*cf. Lewis* v. *United States*, 146 U. S. 370, 378); that the very purpose of the *voir dire* examination is to enable counsel to develop all pertinent facts necessary for an intelligent decision as to whether to challenge a particular talesman, whether for cause or peremptorily; and that the juror's failure to reveal material facts has the necessary effect of nullifying counsel's right of challenge (*Photostat Corporation* v. *Ball*, *supra*, at 786-7).

In the instant case, on the other hand, the District Court, whose opinion was adopted by the Court of Appeals (App., *infra*, p. 1a), refused to apply that standard. Holding that it was immaterial that petitioner's counsel might have exercised one of his peremptory challenges against Cassidy if the pertinent information withheld by Cassidy had been disclosed (657a-661a), the Court stated: "If, now, defendant could have a verdict set aside merely on the grounds that if certain information had been revealed on the *voir dire*, defense counsel might have exercised peremptory challenges in a different manner, then there could never be any finality to litigation involving trial by jury" (661a).

In *Frazier* v. *United States*, 335 U. S. 497, 512-13, this Court addressed itself to a situation where two jurors whose qualifications were challenged by motion for a new trial had answered fully and truthfully all questions put to them on the *voir dire*. Emphasizing that the defense had thus been "afforded the fullest opportunity legally and factually" to develop the facts on the basis of which

the two jurors might have been challenged either peremptorily or for cause, and that such facts were actually either known or could readily have been ascertained by defense counsel, the Court held that the motion for a new trial was properly denied (335 U. S. at 512-13). This Court nevertheless there laid down the principle that even in such a situation—*unlike* the instant case—where a prospective juror has fully and truthfully answered all questions put on the *voir dire*, the defendant is entitled to a new trial, notwithstanding the absence of any challenge to the juror before trial, if the particular factual situation affecting the juror is an "obvious . . . disqualification or . . . inherently prejudicial as a matter of law" (335 U. S. at 513). Manifestly, an even broader remedy is available to the defendant where, as here, he has *not* been "afforded the fullest opportunity legally and factually" for exercising his right of challenge.

In the instant case the record undisputedly establishes at least two instances of the juror Cassidy's concealment of facts having a material bearing on his qualifications:

(A.) He thus failed to disclose the undisputed facts reflected in the statements given to the F.B.I. by the Government witnesses McConnell and DeMarco, to the effect that he, Cassidy, had engaged in discussions during the 1961 U.A.W. strike expressing his resentment because of the "crossing" of the U.A.W. picket lines by petitioner's Teamster local after an initial day of cooperation with the U.A.W. strike activities (517a-518a; Exh. G-1, 622a; 512a; Exh. G-9, 623a). Those statements corroborated the testimony of petitioner's witness Bladen (150a-155, 164a), and Bladen's testimony was in no way controverted.

In view of this showing that Cassidy had previously been adversely affected in his interests both as a labor union

official and as a striking employee, by the action taken by petitioner's local union, and that he had expressed his resentment by reason thereof, the situation was comparable to that of a juror's concealment of a personal grievance that he had against the defendant on trial.

Such facts would have been disclosed if Cassidy had truthfully answered the questions put to him and the other prospective jurors on the *voir dire* as to whether any union to which any of them belonged had ever been assisted in any concerted labor activity by the Teamsters (19a), and also whether any of them knew of any matters that he should call to the Court's attention which might have some bearing on his qualifications to serve (18a). Cassidy, however, did not answer either of those questions, thereby indicating a negative response.

(B.) The District Court's own findings further establish that Cassidy was guilty of misrepresentation in indicating a negative response when he and other prospective jurors were asked (a) by defense counsel, whether any of them "had heard anything derogatory about Mr. Provenzano either from a source of words of mouth or any other means of communication" (22a), and (b) by the Court, whether any of them "had heard about Anthony Provenzano in any way by radio, television or newspaper" (24a). The Court thus acknowledged that the record at least showed "that it would be likely that certain adverse publicity directed toward the defendant would come to the attention of Mr. Cassidy as a member and officer of Local 906 UAW together with other knowledge of the activities of the Teamsters" (661a).

The District Court engaged in sheer speculation in suggesting that the court reporter might have erred in noting only five prospective jurors other than Cassidy who raised

their hands when the question as to publicity was asked by the Court (660a). In any event, the transcript squarely shows that Cassidy likewise made no response when a similar question was asked by defense counsel (22a), and that Cassidy in fact specifically denied having read any newspaper publicity about defendant except for an article in that morning's newspaper which simply stated that the jury would be picked (23a-24a).

To hold, as the courts below have here done, that a defendant is remediless where a juror has thus misrepresented or concealed facts which have a material bearing on his qualifications, is to defeat the very purpose that the *voir dire* examination is designed to serve for the protection of the defendant's constitutional rights, and "as a predicate for the exercise of peremptories" (*cf. Swain* v. *Alabama*, 380 U. S. 202, 218-19). It is no answer to say, as the District Court did, that "defense counsel, with knowledge of Mr. Cassidy's membership in Local 906 and his position as an officer of that union, did not choose to exercise a peremptory challenge as to him" (661a). Obviously, the mere disclosure that Cassidy was a member and officer of that local in no way indicated that he might be prejudiced or that he had failed to give full and truthful answers to the questions put on the *voir dire*. The Court completely ignored the fact that it was because Cassidy did not truthfully answer the questions on the *voir dire* that defense counsel were effectively deprived of their right of challenge, either peremptorily or for cause.

The Third Circuit Court of Appeals had itself previously held in *United States ex rel. De Vita* v. *McCorkle*, 248 F. 2d 1, cert. den. 355 U. S. 873, that a defendant convicted in a state court of murder committed during the course of an armed robbery was entitled to a new trial, as a mat-

ter of due process, because of the failure of one of the jurors to disclose on the *voir dire* that he had previously been the victim of another armed robbery, even though there was no showing of intentional concealment on the juror's part (see 248 F. 2d at 13, dissenting opinion). Emphasizing that the juror's failure to reveal his prior hold-up experience operated to defeat defense counsel's right of challenge (248 F. 2d at 7), the Court further held that the juror "was not likely to forget" his prior experience and that the facts were sufficient to establish "colorable" and "probable" bias on his part (248 F. 2d at 8, 9).

The District Court purported to distinguish the *De Vita* case on the ground that the facts which the juror had not disclosed in that case were undisputed and "were of such nature that bias could reasonably be inferred" (658a-659a). No such distinction can here, however, be made, at least as applied to the undisputed facts relating to the strike incident and the conceded facts concerning adverse publicity. Cassidy's undisclosed prior experience involving the strike incident, in which petitioner's own local union was directly involved and which occasioned expressions of resentment by Cassidy, was at least as material as the undisclosed prior experience of the juror in the *De Vita* case as the victim of another armed robbery which in no way involved the defendants on trial. Cassidy's prior experience sufficed not only to establish "probable" and "colorable" bias on his part, within the standard applied in *De Vita* (248 F. 2d at 8, 9), but also to meet the *Frazier* standard of "inherently prejudicial as a matter of law" (335 U. S. at 513).

As respects Cassidy's failure to disclose his prior exposure to adverse publicity concerning petitioner, the District Court held that even if it were to be assumed that such

exposure "created a biased impression of the defendant in his mind", that would not necessarily be grounds for a challenge for cause, citing *Irvin* v. *Dowd*, 366 U. S. 717 (662a). This Court made it clear, however, in *Irvin* v. *Dowd, supra*, 366 U. S. at 722 (fn. 3), 723, that due process demands that a juror shall not be permitted to sit in a criminal case, regardless of his assurances of impartiality, if the impression which he has formed from pretrial publicity is "a positive and decided one" and "strong and deep". Whether or not a prospective juror has been prejudicially influenced by pretrial publicity, can only be determined from the answers given by him on the *voir dire*. In the present case the District Court completely ignored the fact that the juror Cassidy, by flatly denying his reading of adverse publicity, foreclosed all inquiry as to the extent of his exposure to such publicity and the nature and strength of the impressions created thereby, and effectively deprived defense counsel of any opportunity to challenge him on the basis thereof, whether peremptorily or for cause.

2. As to the District Court's refusal to take into consideration the Government's failure to call the juror Cassidy as a witness.

A further important question of general applicability is here presented as to whether there is any judicial precept or public policy against the post-trial interrogation of a juror, such as was invoked by the District Court as the basis for refusing to take into consideration the Government's failure to adduce any testimony, or even a deposition or affidavit, from the juror Cassidy in refutation of the testimony of petitioner's witnesses.

So far as the Government was concerned, Cassidy was obviously the key potential witness to refute the testimony

of petitioner's witnesses, if refutation were possible. The Government, however, made no effort to call Cassidy as a witness, and did not even obtain any affidavit or deposition from him. At the hearing, petitioner's counsel specifically requested the District Court to "consider the fact that Mr. Cassidy has not come in to deny any of these allegations [of petitioner's witnesses] on the witness stand" (576a).

The Court rejected that request, first stating in unequivocal terms that it "would never permit any juror to impeach a verdict after the jury is discharged", or "to come in and affect any verdict that was rendered by his testimony" (576a-577a); later stating that "a juror should not be permitted either to fortify or to impeach the verdict", except under "special circumstances" which it held it did "not see" "in this particular case as yet" (590a-591a); and further noting that no application had been made to the Court to call Cassidy as a witness (577a-578a, 590a-591a). The Court was clearly in error.

This Court has not spoken on the question here presented since the early case of *Mattox* v. *United States*, 146 U. S. 140, 149, where it cited with approval the holding of *Woodward* v. *Leavitt*, 107 Mass. 453, that it is proper on a motion for a new trial to receive the testimony of a juror in denial or explanation of prejudicial statements allegedly made by him prior to the trial, and explicitly adopted the following rules there enunciated:

> "* * * that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question

> of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. *So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.''**

The soundness and continuing validity of the rules thus announced in *Mattox* have never been questioned, though this Court has in later cases held that "the testimony of jurors should not be received to show matters *which essentially inhere in the verdict itself''*. *Hyde* v. *United States,* 225 U. S. 347, 383-4; *McDonald* v. *Pless,* 238 U. S. 264, 267-8. The testimony of a juror was thus received in *Remmer* v. *United States,* 350 U. S. 377, where the issue related to the effect upon the juror of an unauthorized communication. See also 6 *Moore's Federal Practice,* pp. 3808-10, 3812-14.

In its brief in the Court of Appeals (pp. 36-7), the Government relied primarily, as support for the District Court's ruling, on an asserted judicial policy against post-trial interrogation of jurors, as expressed in *United States ex rel Daverse* v. *Hohn,* 198 F. 2d 934, 938-9 (3d Cir.), cert. den. 344 U. S. 913, to the effect that "the answers given by a juror under oath on the *voir dire* should not be challenged through subsequent questioning of that juror except under exceptional circumstances." While the Court of Appeals did not discuss the issues in its opinion, it is clear that its affirmance turned on, and squarely presents, the question as to the continuing validity of the *Mattox* rule, since its own prior decisions effectively dis-

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* Emphasis throughout this petition is supplied, unless otherwise specified.

pose of any possible alternative bases for the District Court's ruling.

The Government's failure to call Cassidy as a witness, or even to obtain any affidavit from him, clearly called for the application of "the presumption that the testimony, if produced, would be unfavorable" to the Government's position. *Graves* v. *United States,* 150 U. S. 118, 121; *United States* v. *Di Re,* 332 U. S. 581, 593; *Interstate Circuit* v. *United States,* 306 U. S. 208, 226; *United States* v. *Jackson,* 257 F. 2d 41, 43 (3d Cir.).

Contrary to the intimations of the District Court (577a-578a, 590a-591a), the decisions of the Third Circuit Court of Appeals itself establish, in accordance with the rule as stated by Wigmore, that Cassidy could not be regarded as a witness "equally available" to petitioner, since Cassidy, as the target of petitioner's allegations, "by his posion would likely be so prejudiced against the . . . [petitioner] that the latter could not expect to obtain from him the unbiased truth" (2 *Wigmore on Evidence,* §286, p. 168; *United States* v. *Beekman,* 155 F. 2d 580, 584 [2d Cir.]; *Stoumen* v. *Commissioner of Internal Revenue,* 208 F. 2d 903, 907 [3d Cir.]; *United States* v. *Jackson, supra,* 257 F. 2d 41, 44 [3d Cir.]); and that, since accordingly Cassidy "was not the kind of witness that . . . [petitioner] could be expected to call", an adverse inference by reason of the non-production of Cassidy as a witness was properly drawable solely against the Government (*United States* v. *Jackson, supra,* 257 F. 2d at 44).

Apart from reliance on the immaterial circumstance that petitioner had not applied to the Court to have Cassidy called as a witness, the Government offered no excuse for its own failure to take any steps to adduce his testimony and made no claim that he was unavailable by reason of incapacitation or otherwise (590a). While there was hearsay

testimony by lay witnesses as to Cassidy's being "out [away from work] with a heart condition" and a sacroiliac condition (380a), there was a complete absence of any medical testimony or of any showing of hospitalization or as to the nature, extent or duration of any incapacitation on Cassidy's part. The decisions of the Third Circuit Court of Appeals establish that such meager hearsay testimony was insufficient as a matter of law to establish Cassidy's unavailability as a witness. *Cromling* v. *Pittsburgh and Lake Erie R.R. Co.*, 327 F. 2d 142, 149 (3d Cir.); *Blumenthal* v. *United States*, 189 F. Supp. 439, 448 (E. D. Pa.), aff'd. 306 F. 2d 16 (3d Cir.).

3. As to the District Court's error in drawing an adverse inference against petitioner because of his failure to call additional potential witnesses.

The question here presented involves a conflict with the decisions in other circuits and relates to a matter of general importance in the trial of criminal cases.

As shown above, the District Court, as a major basis for its decision, drew an adverse inference against petitioner and held that there was insufficient corroboration of the testimony of petitioner's witnesses, because of his failure to call additional potential witnesses, particularly those mentioned in the testimony as having been present when Cassidy made the derogatory remarks in question (see *supra*, pp. 20-21).

It has been uniformly held in other circuits that there is no basis for drawing an adverse inference against a party by reason of his non-production of additional witnesses where there is no showing that such potential witnesses were in any better position to have observed the incidents in question than those who did testify or that their testimony would be anything more than cumulative. *United*

States v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 638-9 (2d Cir.), cert. den. 329 U. S. 742; *Morton* v. *United States*, 147 F. 2d 28, 31 (D. C. Cir.), cert. den. 324 U. S. 875; see also 2 *Wigmore on Evidence*, §287, pp. 168-9. Any other rule would result in needless cluttering of the record and in prejudice to "economy of trial-time", by compelling a party to call to the stand every possible witness who might be able to testify with regard to the particular matter in issue. See *Morton* v. *United States, supra*, 147 F. 2d at 31.

The decision of the District Court, which was adopted by the Court of Appeals herein, was in direct conflict with the foregoing cases since here, just as in those cases, there was "not the slightest indication, nor may we indulge in any presumption, that the witnesses not called were in any better position to have observed . . . [the incidents in question] than those who were, or that their testimony would be anything more than cumulative." See *United States* v. *Antonelli Fireworks Co., supra*, 155 F. 2d at 638-9.

Furthermore, any such potential witnesses, if available at all, were equally available to the Government, and no adverse inference could in any event be drawn *solely* against petitioner, as the courts below here did, even under the rule proposed in 2 *Wigmore on Evidence*, §288, p. 171, under which an inference could be drawn in such a situation "*against both parties*, the particular strength of the inference against either depending on the circumstances." Indeed, even under the latter rule, no adverse inference could be drawn against petitioner at all, since as noted, so far as he was concerned the testimony of such potential witnesses would be purely cumulative. Any adverse inference would, rather, be required to be drawn against the Government on the basis of its failure to call any such potential witnesses, since their testimony, if favorable to the Government, would not be merely cumulative but would instead

be of major importance to its position. See *Stoumen* v. *Commissioner of Internal Revenue, supra,* 208 F. 2d 903, 907 (3d Cir.).

Moreover, petitioner's failure to call additional potential witnesses could not operate to discredit the testimony of the witnesses whom he did call. *Pacific-Atlantic S.S. Co.* v. *United States,* 175 F. 2d 632, 636 (4th Cir.), aff'g 81 F. Supp. 777, 795-6 (E. D. Va.).

4. As to the District Court's refusal to consider anti-Teamster prejudice on the juror's part as a basis for relief.

A further question of general applicability is here presented, as to whether a showing of strong prejudice on the part of a juror against a group of which the defendant on trial is a prominent member, may be disregarded on the theory that the prejudice is not shown to be directed against the defendant individually.

Underlying the District Court's decision in this case is the premise that petitioner was not entitled to a new trial on the basis of a showing merely that the juror Cassidy had expressed strong prejudice against the Teamsters in general, so long as it was not established to the Court's satisfaction that Cassidy had inveighed against petitioner personally. The Court thus interpreted the testimony of petitioner's witness Donnelly as tending to "support an inference that Mr. Cassidy entertained no prejudice toward Provenzano", for the reason that, according to the Court's erroneous version of Donnelly's testimony (see *supra,* p. 21), "Mr. Cassidy had mentioned the Teamsters and Hoffa in conversations on many occasions but had not been heard to mention Mr. Provenzano" (651a-652a). Further, in stating its conclusion that petitioner had failed to sustain his burden of proof, the Court emphazed that Cassidy

"was not acquainted with *Mr. Provenzano*"; that there was "no logical reason why Mr. Cassidy should bear *Mr. Provenzano* any personal ill will"; and that the Court could not reasonably infer any preconceived prejudice in Cassidy's mind against *petitioner*, such as would impel him to vote for conviction on any basis other than fair and impartial consideration of the evidence (657a).

In keeping with the foregoing premise, the Court emphasized the testimony of the key Government witness McConnell that "he had never heard Mr. Cassidy discuss *Anthony Provenzano*" (650a), and completely ignored the significant fact that nowhere in his testimony did McConnell deny having heard Cassidy make derogatory remarks about *the Teamsters*, such as were testified to by petitioner's witnesses Bladen and Donnelly. The Court further disregarded the fact that there was no testimony by McConnell to controvert Donnelly's testimony that McConnell was present on a number of occasions when Cassidy stated that the Teamsters as a whole were "no good, racketeers, thieves, hoods", without mentioning petitioner's name (539a, 549a, 550a), and that McConnell himself had expressed similar sentiments (541a).

Even if the facts in this record were to be regarded as establishing nothing more than that the juror Cassidy had on a number of occasions expressed strong feelings of prejudice against Teamster officials as a whole, without mentioning petitioner's name, it is manifest that such a showing would suffice to establish an "inherently prejudicial" situation and "probable" and "colorable" bias against a high Teamster official such as this petitioner, who was an international vice-president of the Teamsters as well as a local Teamster union president. *Cf. Frazier* v. *United States, supra,* 335 U. S. 497, 513; *United States ex rel. De Vita* v. *McCorkle, supra,* 248 F. 2d at 8, 9.

The narrow criterion here applied by the District Court, and approved by the Court of Appeals, is hardly in keeping with this Court's insistence that the "mental attitude" of a juror in a criminal case must be one "of appropriate indifference." *Cf. Irvin* v. *Dowd, supra,* 366 U. S. at 724. The District Court's position is indeed to be contrasted with its action at the trial in excusing another prospective juror merely on the latter's expression of reservations as to whether he could be impartial in a case involving a member of the Teamsters (26a-27a).

5. As to this Court's power to make an independent evaluation of the evidence.

The question here presented is whether the power which this Court has consistently exercised, even on appeals from state courts, "where necessary to the determination of constitutional rights, [to] make an independent examination of the facts, the findings, and the record" (*e.g., Ker* v. *California,* 374 U. S. 23, 34; *Napue* v. *Illinois,* 360 U. S. 264, 272), is equally applicable in a federal criminal case such as this, where the issues raised bear directly on petitioner's constitutional rights to trial by an impartial jury, under the Sixth Amendment, and to due process of law, under the Fifth Amendment (see *Irvin* v. *Dowd, supra,* 366 U. S. at 722, 723).

That question has not been heretofore directly determined by this Court. In *Irvin* v. *Dowd, supra,* however, this Court emphasized, in a federal *habeas corpus* proceeding involving an issue of juror prejudice in a state court criminal trial, that it was the "duty of the Court of Appeals" in that case—and presumably also that of this Court—"to *independently* evaluate the *voir dire* testimony of the impaneled jurors" (366 U. S. at 723). This Court has likewise reversed contrary factual determinations of

the courts below and directed a new trial "on a consideration of all the evidence", in cases involving unauthorized communications with a juror. *Remmer* v. *United States, supra,* 350 U. S. 377, 382; *Gold* v. *United States,* 352 U. S. 985.

In the court below, the Government urged that the scope of appellate review in this case was controlled by *United States* v. *Johnson,* 327 U. S. 106, which involved a motion for a new trial on allegations of perjury by a Government witness. That case has no application to a motion for a new trial predicated on constitutional grounds, as in this case, relating to juror bias. The *Johnson* case indeed arose on affidavits, without any oral hearing, and this Court emphasized that the trial judge, in view of his conduct of the original trial, "was exceptionally qualified to pass on the affidavits" (327 U. S. at 112). In contrast, the matters here at issue were not before the trial judge at all on the original trial, in view of the juror Cassidy's failure to disclose the pertinent facts on his *voir dire* examination.

This Court has indeed indicated that the *Johnson* decision is limited in application to "the *ordinary* defense motion for new trial" on newly discovered evidence (see *Mesarosh* v. *United States,* 352 U. S. 1, 12, fn. 7)—*i.e.,* a motion based on new evidence in conflict with the trial testimony (see *Mesarosh* v. *United States, supra,* 352 U. S. at 12, fn. 6). Not only is the motion in this case not of that character, but since it directly involves petitioner's constitutional rights, the scope of review on appeal is necessarily a broad one under the foregoing authorities.

Thus, in *Remmer* v. *United States, supra,* 350 U. S. 377, this Court nowhere in its opinion suggested any limitations on its power to consider the evidence independently of the District Court's findings. Even though the District Court

in that case received testimony from the particular juror and the F.B.I. agent involved, and on the basis of that testimony and its observation of the witnesses, found that the incident in question was entirely harmless and had no effect whatever on the juror's state of mind, this Court held that there was sufficient evidence in the record to enable it to reach a conclusion contrary to that of the District Court, "on a consideration of all the evidence." The *Remmer* rationale has equal applicability here, even though that case involved an issue of unauthorized communication with a juror, since the basic question in *Remmer* was that of the effect of the incident in question on the juror's state of mind.

Petitioner here made an extremely forceful showing through the testimony of eight separate witnesses that the juror Cassidy had over a period of years expressed strong feelings of hatred, hostility and prejudice directed against petitioner personally as well as against the Teamsters as a whole and James Hoffa; that he had referred to petitioner as a gangster, racketeer and associate of the underworld and accused him of using strong arm methods against employers and intimidating tactics against his fellow union members and of fixing elections of union officers; that Cassidy's interests as an official of U.A.W. Local 906 and as striking employee had been adversely affected by petitioner's refusal to continue to lend the cooperation of his Teamster local after an initial day of cooperation in the U.A.W.'s strike activities in November, 1961, and that Cassidy had expressed his resentment and opposition against petitioner by reason thereof; and that Cassidy had in discussions with others referred to various highly prejudicial newspaper stories and leaflets concerning petitioner (see *supra*, pp. 9-14).

That showing was not substantially refuted by the Government's six witnesses. Indeed, as shown above, there was no dispute as to the 1961 strike incident. Thus, the Government witnesses McConnell and DeMarco both gave statements to the F.B.I. that Cassidy had engaged in discussions during the 1961 U.A.W. strike expressing his resentment because of the Teamsters' "crossing" of the U.A.W. picket lines, thereby corroborating Bladen's testimony about that incident (see *supra*, pp. 18, 13). The testimony of the Government witnesses further confirmed that the atmosphere at the Ford plant was one in which there was constant disputation about petitioner and the Teamsters (see *supra*, p. 16). A reading of the entire record makes it clear beyond any doubt that petitioner fully sustained his burden of proof. Indeed, the complete absence of any testimony by Cassidy in denial or explanation of the facts as testified to by petitioner's witnesses, is itself "evidence of the most convincing character" in support of petitioner's position. See *Interstate Circuit v. United States, supra*, 306 U. S. 208, 226.

The testimony of the four Government witnesses who worked in the LCL office—Squires, Scantland, Snaguski and Bloom—at most showed, *not* that there were no arguments between Giannone and Cassidy, as testified to by petitioner's witnesses, but merely that the four Government witnesses deliberately paid no attention to arguments going on about them because they were too busy with their own work (see *supra*, pp. 17-18). Indeed, Bloom, asked by the F.B.I. whether he had heard any of the alleged arguments between Giannone and Cassidy, did not say that there were no such arguments but instead said merely "I try not to listen to all these arguments, but I had heard one argument"—referring to the post-trial argument between Giannone and Cassidy (412a, 402a).

Further, Snaguski admitted to petitioner's investigator that he did at times hear "bits of discussions" between Giannone and Cassidy concerning the Teamsters and the U.A.W. (437a-438a); and Bloom did not controvert the testimony of petitioner's investigator that Bloom told the investigator that he might "have been around or passing by" when Giannone and Cassidy "had some sort of an argument," but that he didn't "know what they argued about" and didn't "care unless it involved" him (407a, 471a).

As regards the Government witness McConnell, who was a close friend and political ally of Cassidy (379a-380a), he nowhere in his testimony denied having heard Cassidy make derogatory remarks *about the Teamsters* or other Teamster officials, and he admitted that he himself had engaged in discussions with Giannone in the LCL office concerning the comparative merits of the Teamsters and the U.A.W. (385a-388a).

As regards the Government witness DeMarco, who had run on the same slate with Cassidy from 1954 to 1960 (352a), he admitted that he made the flat statement to petitioner's attorney in October 1964 that he couldn't understand why petitioner's trial counsel had allowed Cassidy to sit on the jury (362a), and he cooperated with petitioner's attorney in furnishing the names of potential witnesses (363a, 364a, 367a, 368a, 374a). The gist of his testimony was that he did not have personal knowledge of any prejudice on Cassidy's part against petitioner, but that he cooperated with petitioner's attorney on the basis of what Bladen had told him, shortly after petitioner's trial, about derogatory remarks by Cassidy concerning petitioner (374a, 377a).

Particularly in view of the undisputed facts concerning the 1961 strike incident, the record is sufficient to require a finding in favor of petitioner that he was deprived of his constitutional right to a trial by an impartial jury by reason of the presence thereon of a prejudiced juror. *Cf. Remmer* v. *United States, supra,* 350 U. S. 377, 380, 381-2.

CONCLUSION

For all of the reasons advanced, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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WARREN W. WILENTZ,
ALFRED DONATI, JR.,
Of Counsel.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,317

UNITED STATES OF AMERICA,

v.

ANTHONY PROVENZANO,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued November 15, 1965

Before KALODNER, *Chief Judge* and MCLAUGHLIN and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed—December 22, 1965)

PER CURIAM:

On review of the record we find no error. The District Court's Order Denying Defendant's Motion for a New Trial will be affirmed for the reasons so well stated by Judge Shaw in his Opinion reported at 240 F. Supp. 393 (D.N.J. 1965).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 15,317

UNITED STATES OF AMERICA,

v.

ANTHONY PROVENZANO,

Appellant

(D. C. Criminal No. 429-60)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: KALODNER, *Chief Judge,* and MCLAUGHLIN and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court denying defendant's motion for a new trial, filed March 30, 1965, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

December 22, 1965

APPENDIX C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPPEALS
FOR THE THIRD CIRCUIT

No. 15,317

UNITED STATES OF AMERICA

v.

ANTHONY PROVENZANO,

Appellant

SUR PETITION FOR REHEARING

Present: KALODNER, *Chief Judge*, McLAUGHLIN, STALEY, HASTIE, GANEY, SMITH, FREEDMAN, *Circuit Judges*

The petition for rehearing filed by Appellant, Anthony Provenzano in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

KALODNER
Chief Judge

Dated: January 25, 1966